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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

WARREN J. MICHAELS,

Plaintiff and Respondent,

v.

RICHARD D. MARCONI, et al.,

Defendants and Appellants.

E048114

(Super.Ct.No. INC080760)

OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp and Sharon J. Waters, Judges. Affirmed.

Paul R. Roper, Jonathan Barry Sexton and Stephen T. Kitagawa, for Defendants and Appellants Richard D. Marconi, Paul R. Roper and Paul R. Roper, P.C.

Warren J. Michaels, in pro. per., for Plaintiff and Respondent.

Plaintiff and respondent Warren J. Michaels (Michaels) provided accounting services for Richard D. Marconi (Marconi) and Global Health Sciences, Inc. (Global). Michaels was not paid for his services, and thus, he filed this action alleging, inter alia, that Marconi, Global, Paul F. Marx (Marx), Rutan & Tucker, LLP (Rutan), Paul R. Roper

and Paul R. Roper P.C. (Roper), and Penelope Parmes (Parmes) misrepresented the facts, and Marconi specifically misrepresented that he would pay Michaels for his services. Marconi and Roper filed a motion to strike Michaels's claims for trespass to chattel, conversion, and deceit in the complaint (anti-SLAPP motion) pursuant to Code of Civil Procedure¹ section 425.16 (anti-SLAPP statute). They argued that those claims arose out of Marconi's right to petition the government. They further argued Michaels failed to establish a probability that he would prevail on his claims. The trial court found that the claims for trespass to chattel and conversion "could hardly be said to chill protected speech by [Marconi]." Further, the court found that Michaels's complaint stated "sufficient evidence to make out a prima facie case of his [claim for deceit]." Defendants and appellants Marconi and Roper appeal, challenging the trial court's findings. We will hold that the trial court correctly denied the anti-SLAPP motion.

I. PROCEDURAL BACKGROUND AND FACTS

Michaels is a certified public accountant who performed accounting and tax services for Marconi and Global. Michaels entered into an oral contract with Marconi to file federal income tax refund claims for Marconi for the years 1996, 1997, 1998 and 1999. The claims were dependent upon the pass through of goodwill deductions in the year 2000 from Global to Marconi. Michaels sought legal assistance regarding the

¹ All further statutory references are to the Code of Civil Procedure unless otherwise noted.

deductibility of goodwill on an amended tax return. Roper suggested consulting with Marx and Rutan. Marx provided the requested advice with Roper present.

In or about December 2003, Marx represented that Global was entitled to write off its unamortized goodwill in the year 2000 because the goodwill was acquired by a cash purchase of stock of related companies in its reorganization on or about April 22, 1998. In or about January 2004, Marconi orally employed Michaels at the offices of Rutan for the purpose of amending Global's income tax return. At the same meeting, it was resolved by Marconi, Roper, Marx, and Parmes, a bankruptcy attorney with Rutan, that Michaels would be elected president of Global. Relying on Marx's statements, in March 2004 Michaels prepared an amended tax return for Global for the year 2000, and in June 2004 he prepared amended tax returns for Marconi for the years 1996, 1997, 1998 and 1999.

In June 2006, Marconi orally agreed to pay Michaels for his services the amount of the interest on Marconi's federal income tax refunds for the years 1999 through 2006. In September and November 2006, Marconi received \$27,398,688.76 in income tax refunds from the federal government, inclusive of \$4,673,910.76 in interest on the claims. In or about December 2006, Michaels delivered his work papers and other documents relating to the amended federal income tax returns of Global and Marconi to Roper and Marconi for copying and scanning only. Marconi and Roper failed to return the work papers. Michaels requested return in or about the period from December 2007 through August 2008; however, the papers have not been returned. In January 2008, Marconi refused to pay Michaels for his services.

In summer 2008, Michaels sent several letters to defendants relating to the questionable deductibility of goodwill written off on Global's 2000 federal income tax returns. On October 6, 2008, Michaels filed a verified complaint in the present action against defendants alleging (1) breach of contract, (2) fraud, (3) trespass to chattel, (4) conversion, (5) intentional interference with contract, (6) deceit (intentional misrepresentation of fact), (7) deceit (negligent misrepresentation of fact), and (8) deceit (suppression of fact).

On December 22, 2008, Marconi and Roper filed an anti-SLAPP motion claiming that Michaels's claims for trespass to chattel, conversion and deceit were barred by section 425.16. Specifically, it was alleged that these causes of action were based on acts in furtherance of Marconi's right to petition the government, and that they should be dismissed unless Michaels was able to demonstrate the probability that he would prevail on such claims at trial. Michaels opposed the motion and the matter was taken under submission.

On February 6, 2009, the trial court found that the anti-SLAPP statute did not apply to the claims for trespass to chattel and conversion because the statute did not "extend to claims based upon the right to possession of [Michaels's] papers," but did find that the statute applied to "the eighth cause of action, for fraud, because that cause of action relates to misleading or inaccurate statements made in preparation for seeking the tax refund from the IRS." The court further found that Michaels's "verified complaint states sufficient evidence to make out a prima facie case of his eighth cause of action and

therefore the special motion to strike is denied as to that cause of action.” Defendants Marconi and Roper appeal.

II. STANDARD OF REVIEW

The anti-SLAPP statute (strategic lawsuit against public participation), section 425.16, provides, in part: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

(§ 425.16, subd. (b)(1).) An “act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue” “includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 426.16, subd. (e).)

The statute was enacted “to prevent and deter ‘lawsuits [referred to as SLAPP’s] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’ [Citation.] Because these meritless lawsuits seek to deplete ‘the defendant’s energy’ and drain ‘his or her resources’ [citation], the Legislature sought “‘to prevent SLAPPs by ending them early and without great cost to the SLAPP target’” [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.] In doing so, section 425.16 seeks to limit the costs of defending against such a lawsuit. [Citation.]” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

The statute establishes a “two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’ [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*); § 425.16, subd. (b)(1).) “[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have “‘stated and substantiated a legally sufficient claim.’” [Citations.] ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if

the evidence submitted by the plaintiff is credited.” [Citations.] [¶] Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier, supra*, at pp. 88-89.)

On appeal, we independently review the evidence supporting both prongs of the analysis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 [Fourth Dist., Div. Two].)

III. DO THE CAUSES OF ACTION ARISE FROM PROTECTED ACTIVITY?

Under the first prong of the anti-SLAPP statute, we must determine whether defendants have made a threshold showing that the challenged cause of action arises from an act in furtherance of Marconi’s right of petition. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Our “focus is not the form of the plaintiff’s cause of action, but, rather, the defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” (*Navellier, supra*, 29 Cal.4th at p. 92.) If the cause of action involves both constitutionally protected and unprotected conduct, we must determine the “principal thrust or gravamen” of the cause of action. (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 413-414.) “We assess the principal thrust by identifying ‘[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.’ [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

Defendants contend the complaint arises out of Marconi's right to petition the Internal Revenue Service (IRS) for a refund, and hence out of statements made in an official proceeding. As to the fraud cause of action, the trial court agreed; however, as to the other claims, it did not.

Regarding the fraud claim, defendants argue it is "entirely based on the content of amended federal tax returns prepared and filed by [Michaels] at the behest of Marconi and his attorneys, i.e. the eighth cause of action is entirely based on Marconi petitioning the government for tax relief." The trial court agreed, but we do not. In addition to the allegations of misrepresentations regarding the right to file amended income tax returns for Global, Michaels also alleged that defendants misrepresented their intent to name him president of Global. While this claim does not arise from an act in furtherance of Marconi's right of petition to the IRS, the prior claim arguably does. Thus, out of an abundance of caution, we will assume, without deciding, that the trial court correctly found the first prong was met.

Regarding the claims for trespass to chattel and conversion, defendants argue that "the documents that formed the basis of [Michaels's] third and fourth cause[s] of action are the product of Marconi petitioning the government for tax relief, and the further explication of his petitioning at a formal audit." However, as the trial court correctly pointed out, Michaels's claim to his own papers² "does not relate to the preparation for petitioning the government." In fact, these causes of action arose long after Marconi

² "Plaintiff delivered his work papers and other documents related to the amended federal income tax returns . . . to . . . Roper, . . . for scanning or photocopying only."

received his federal tax refunds in 2006. It was not until December 2007, continuing through the filing of the complaint in October 2008, that Michaels's claims arose. Thus, these two claims are removed from the "protected petitioning" by Marconi to the IRS. As the trial court recognized, defendants "seem to concede as much, because, as they pointed out at oral argument, they are not moving to strike [Michaels's] claim for breach of contract, recognizing that not every cause of action in the complaint would violate the anti-SLAPP statute." The trial court correctly denied defendants' anti-SLAPP motion as to Michaels's claims for trespass to chattel and conversion.

Because we find the deceit claim arguably arises from protected speech, we continue with the second step and analyze the likelihood of Michaels's succeeding on that cause of action.

IV. IS THERE A PROBABILITY THAT MICHAELS WILL SUCCEED?

To satisfy the second prong of the anti-SLAPP statute, Michaels needs to demonstrate that his claim is both legally sufficient and supported by evidence which, if credited, supports a sufficient prima facie showing of facts to sustain a favorable judgment. (*Navellier, supra*, 29 Cal.4th at pp. 88-89.) "For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to

the plaintiff’ [Citation.] The plaintiff need only establish that his or her claim has ‘minimal merit’ [citation] to avoid being stricken as a SLAPP. [Citations.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

In order to prove deceit, a plaintiff must establish: “(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.]” (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) According to his verified complaint, Michaels stated that defendants represented that Global was entitled to write off its unamortized goodwill and that Michaels would become president of Global. He claims the representations were intentionally made and were false, and that he was unaware of their falsity. In reliance on these representations, Michaels spent “thousands of hours of his time” providing professional accounting services for which he suffered emotional distress and was damaged in the sum of \$4,673,910.76.

On appeal, defendants contend that, because the verified complaint alleges they believed the representations of Marx as true, the trial court erred in finding a prima facie case of deceit. We disagree. While the complaint does allege that defendants believed the representations of Marx as true, it also alleges that defendants had “first-hand knowledge of the events that occurred in or about April 22, 1998,” which allegedly gave rise to the right to write off unamortized goodwill, but suppressed those facts from Michaels. At neither the trial level nor on appeal do defendants deny they had first-hand knowledge of the events. Michaels claims the facts were that Global was not entitled to

write off unamortized goodwill because it required “an election under Internal Revenue Code [section] 338.” Defendants do not even address the claim that they deceived Michaels into believing he would become president of Global.

Moreover, according to Michaels, as a result of his accounting services, in September and November 2006, Marconi received \$27,398,688.76 in income tax refunds from the federal government, inclusive of \$4,673,910.76 in interest on the claims. Defendants do not deny that Marconi received this amount of money, nor do they argue that Marconi was legally entitled to receive the money. Clearly, defendants misrepresented the facts to Michaels in order to use him for his services. They failed to provide Michaels with the facts so that he would file the amended federal income tax returns for Global. They never made Michaels president of Global, nor do they deny they told Michaels he would be made president. More importantly, Marconi has never paid Michaels for his services, and defendants do not claim otherwise.

Given the above, we conclude that Michaels has met his burden of demonstrating that his claim is both legally sufficient and supported by evidence, which, if credited, supports a sufficient prima facie showing of facts to sustain a favorable judgment.

V. DISPOSITION

The order denying defendants' anti-SLAPP motion is affirmed. Michaels is to recover his costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.